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In the Supreme Court of the United States

OCTOBER TERM, 1970

70-319

No. ~~1864~~

BEATRICE LINSCOTT,
PETITIONER,

v.

MILLERS FALLS COMPANY,
UNITED ELECTRICAL, RADIO & MACHINE
WORKERS OF AMERICA (UE), and
UE LOCAL 274,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

BEATRICE LINSCOTT,
PETITIONER,

v.

MILLERS FALLS COMPANY,
UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA (UE), and
UE LOCAL 274,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner BEATRICE LINSCOTT respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on March 29, 1971.

Opinions Below

The opinion of the District Court granting Respondents' motions to dismiss is reported at 316 F. Supp. 1369 and is

reproduced in Appendix C hereto, p. 28. The opinion of the Court of Appeals affirming the judgment of the District Court is reported at 440 F.2d 14 and is reproduced in Appendix A hereto, p. 17.

Jurisdiction

The judgment of the Court of Appeals was entered on March 29, 1971. This Court has jurisdiction to review this judgment under 28 USC § 1254(1).

Question Presented

Whether the union shop provisions of §§7 and 8(a)(3) of the National Labor Relations Act, as applied to the petitioner, who refuses to pay dues and fees to any labor organization on the basis of religious belief, violate petitioner's rights of free exercise of religion, or other rights protected by the First, Fifth or Ninth Amendments to the Constitution.

Constitutional Provisions and Statutes Involved

UNITED STATES CONSTITUTION

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indict-

ment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

NATIONAL LABOR RELATIONS ACT, §7,
29 USC §157, 61 Stat. 140

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

NATIONAL LABOR RELATIONS ACT, §8(a)(3),
29 USC §158(a)(3),
61 Stat. 140-141, 65 Stat. 601, 73 Stat. 525

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

NATIONAL LABOR RELATIONS ACT, §14(b), 29 USC §164(b), 61 Stat. 151

SEC. 14(b). Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Statement Under Rule 33(2)(b)

Since this proceeding draws into question the constitutionality of §§7 and 8(a)(3) of the National Labor Relations Act, an act of Congress affecting the public interest, as applied to the petitioner in the circumstances of this case, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 USC §2403 may be applicable.

On October 28, 1970 the Court of Appeals entered a certification to the Attorney General under the provisions of 28 USC §2403 and F.R.A.P. Rule 44.

Statement of the Case

The petitioner brought this action in the United States District Court for the District of Massachusetts. Jurisdiction of the District Court was invoked under 28 USC §1331(a), the questions presented arising under the Constitution and laws of the United States and the amount in controversy exceeding the sum of ten thousand dollars.

The complaint, filed March 31, 1970, contains the following allegations:

The petitioner is a Seventh-day Adventist, having been a member of that denomination since 1947. As such she believes that she should "stand apart" from a relationship in which coercion is used to enforce the objectives of a labor union, and she is conscientiously opposed to making any financial contribution to any labor organization.

The respondent Millers Falls Company is an employer engaged in commerce within the meaning of the National Labor Relations Act. The Respondent Unions are labor organizations within the meaning of that Act. On or about February 18, 1966, the National Labor Relations Board certified the Respondent United Electrical, Radio & Machine Workers of America (UE) as the collective bargaining representative of the Respondent Company's production and maintenance employees.

Between August 1, 1968 and October 11, 1968 the Respondents entered into a collective bargaining agreement requiring all employees of the Company to be members of the Unions in good standing during the term of the Agreement and providing "[g]ood standing shall mean only the payment of initiation fees, if any, and periodic dues regularly required of members of the Union under its by-laws and constitution."

The Petitioner was employed by the Company continuously from August 1, 1950 until October 11, 1968 in the above-described bargaining unit. When the union shop agreement went into effect, the Petitioner informed the Company of her religious beliefs which led her to refuse to pay dues or fees to any labor organization. A representative of the Seventh-day Adventist Church attempted to meet with both Company and Union officials in the Peti-

tioner's behalf on or about October 10, 1968; but was refused a meeting by both. Letters in behalf of the Petitioner were thereupon sent to both Company and Union officials by a representative of the General Conference of Seventh-day Adventists, explaining her conscientious objection to contributing financially to a labor organization and proposing as an alternative to payment of union dues and fees (1) that an equivalent sum be contributed to a non-religious national charity, (2) that the Petitioner abide by the regulations of the shop and the union with regard to wages and working conditions, and (3) that in the event of strike, the Petitioner would side with neither employer by remaining at work nor with the union by participating in strike activities and the Petitioner would refrain from any interference with union picketing.[1] In spite of all attempts of the Petitioner and representatives of her church to make possible her continued employment under the union shop agreement without violating her religious beliefs, the Petitioner was discharged by the Respondent Company at the insistence of the Respondent Unions on October 11, 1968, solely because of her refusal on grounds of religious belief to pay dues and fees to the Unions. At the time of her discharge after eighteen years of service with the Company, the Plaintiff was forty-five years of age, found it necessary to accept other employment at a substantially reduced rate of pay, and suffered the loss of fringe benefits including the right to a pension, vacation pay, group insurance and bonuses.

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[1] The contents of a similar letter are set forth in *Gray* v. *Gulf, Mobile & Ohio Railroad Company*, 429 F.2d 1064, 1067-1068 (note 4).

The Petitioner exhausted any possible rights under the grievance procedure of the collective bargaining agreement before bringing this action.

The complaint also alleges that §§ 7 and 8(a)(3) of the National Labor Relations Act, the certification of the Union by the National Labor Relations Board, and the union shop provision of the collective bargaining agreement violate Petitioner's rights of free exercise of religion, due process of law and other rights guaranteed by the First, Fifth and Ninth Amendments of the United States Constitution. The complaint prays for an injunction reinstating the Petitioner to her job, damages, and declaratory relief as to the constitutional rights alleged.

All Respondents moved to dismiss the complaint for failure to state a claim. These motions were granted by the District Court, and judgment entered dismissing the complaint.

The Court of Appeals affirmed this judgment.

Reasons for Granting the Writ

I. THIS CASE RAISES AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT PREVIOUSLY BEEN DECIDED BY THIS COURT, NAMELY WHETHER THE CONSTITUTION PROTECTS THE RIGHT OF AN INDIVIDUAL EMPLOYEE ON THE BASIS OF RELIGIOUS BELIEF AND CONSCIENCE TO REFUSE TO PAY DUES OR FEES TO A LABOR UNION.

The question raised in this case is vital to the livelihoods of Americans belonging to a variety of religious sects, including Seventh-day Adventists, National Association of Evangelicals, Mennonites, Plymouth Brethren

I, II and IV, Christadelphians, Old German Baptists, Amish, and Christian and Missionary Alliance. See Senate Report No. 697, 89th Congress, 1st Session, Page 1. The foregoing groups, representing perhaps approximately 1% of the labor force, constitute a sufficiently broad class so that it would be desirable for the question involved in this case to be decided by this court.

This case represents the fourth time that this question has been raised in a United States Court of Appeals. It arose first in behalf of the Plymouth Brethren in *Otten* v. *Baltimore & O. R. Co.*, 205 F.2d 58, final judgment affirmed sub nom. *Otten* v. *Staten Island Rapid Transit Railway Co.*, 229 F.2d 919, (CA 2) cert. den. 351 U.S. 983 and *Wicks* v. *Southern Pacific Co.*, 231 F.2d 130 (CA 9) cert. den. 351 U.S. 946. The same issue was raised in behalf of a Seventh-day Adventist in *Gray* v. *Gulf, Mobile & Ohio Railroad Company*, 429 F.2d 1064 (CA 5), cert. den. 400 U.S. 1001.[2]

A related issue involving freedom of association based on conscientious objection to joining a union was raised in *Russell* v. *Cutherwood*, 33 App. Div. 2d 592, 304 N.Y.S. 2d 415, cert. den. 399 U.S. 936.[3]

The Court of Appeals for the Fifth Circuit in deciding the *Gray* case squarely held that *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, was dispositive of the issue involved in these cases; 429 F.2d at 1068. The Court of Appeals for the First Circuit below also implies that *Hanson* is determinative of this case, saying "*Hanson's* balancing, and thus its conclusion, should be the same in the case before us, since the government's interest, and the Plaintiff's burden (loss of a union-shop employer) are apparently the same." 440 F.2d at 17 (Appendix A,

[2] Mr. Chief Justice Berger and Mr. Justice Douglas dissenting.

[3] See dissenting opinion of Mr. Chief Justice Berger with whom Mr. Justice Douglas joined.

p. 21). The *Hanson* case was a suit brought in the Nebraska State Courts by nine employees of the Union Pacific Railroad Company, as a class action in behalf of all Nebraska employees of the Railroad, seeking to invalidate the union-shop provision of the Railway Labor Act on the ground that all employees would be required to pay to a union dues and fees which might be used in part for purposes other than collective bargaining, thereby interfering with alleged freedom of association and freedom of expression of the employees. The Court made it clear, 351 U.S. at 238, that the record of that case did not raise any specific issue of use of union funds for other than collective bargaining purposes, and the court upheld the validity of the union-shop provision. That the union-shop provision of the Railway Labor Act was sustained in *Hanson* only on its face, and not as applied to any particular situation, was made clear in *International Assn. of Machinists* v. *Street,* 367 U.S. 740, 747, 748. The *Hanson* opinion clearly left open the possibility of First Amendment questions arising in particular cases, with the statement on page 238, "If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case."

In every sense Seventh-day Adventists and other dissenters in the position of the petitioner are forced to choose between the precepts of their religion and their livelihoods. Cf. *Sherbert* v. *Verner,* 374 U.S. 398, 404. It is simply not true, as suggested in the concurring opinion of Judge Coffin below, 440 F.2d at 20 (Appendix A, p. 26) that there are "alternate routes". Neither the N.L.R.B. nor the E.E.O.C. can reasonably be expected to recog-

nize a religious right to refuse to pay dues to a labor organization, unless this Court, in a case such as this one, declares that such a right exists.

With the spread of unionization of employees and the growth of the union shop, members of religious groups who object on grounds of conscience to supporting labor unions are being driven into smaller and smaller pockets of non-union employment.

The question in this case is therefore one which has not been decided by this court, which seriously affects a significant number of people, and which is consequently likely to continue arising until this court has decided it.

II. THE OPINION OF THE COURT OF APPEALS IN THIS CASE CONFLICTS IN PRINCIPLE WITH THE DECISION OF THIS COURT IN *Sherbert* v. *Verner*, 374 U.S. 398, AND OTHER DECISIONS FOLLOWING THAT CASE.

The *Sherbert* case upheld the right of a Seventh-day Adventist to receive unemployment compensation benefits from the State of South Carolina notwithstanding her unavailability for Saturday work based on religious belief. In balancing the religious claim against that of the State, this court, 374 U.S. at 403, adopted the "compelling state interest" test of *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438, and held that there was no compelling state interest enforced in the eligibility provisions of the South Carolina statute to justify the substantial infringement of the Appellant's right of free exercise of religion, 374 U.S. at 406-409.

It is significant to note that in *Sherbert* the court did not hold that there was no compelling state interest in the establishment or operation in general of an unemployment compensation system by the State, but rather

that there was no such interest justifying the substantial infringement of First Amendment rights in the particular application of the eligibility requirements. It was the specific possibility of filing fraudulent claims and consequent dilution of the unemployment compensation fund, rather than the general policy involved, to which the court looked to see if there was a compelling state interest, 374 U.S. at 407.

This specific meaning of "compelling state interest" also becomes clear from other cases following *Sherbert*. In *In re Jenison*, 375 U.S. 14, this court vacated the judgment of the Supreme Court of Minnesota, upholding a contempt conviction of a woman who refused on religious grounds to serve as a juror, and directed the Supreme Court of Minnesota to consider the case further in the light of *Sherbert* v. *Verner*. Upon reconsideration, *In re Jenison*, 267 Minn. 136, the Minnesota court held that there was an inadequate showing that the state's interest in obtaining competent jurors required the court to override the claim of free exercise of religion. This case did not hold that there was no compelling state interest in obtaining service of jurors, but rather that there was no such interest in compelling 100% enforcement of such a requirement against a religious objector.

In *People* v. *Woody*, 61 Cal. 2d 716 (1964) the Supreme Court of California upheld the right of Indians who are members of the Native American Church to use peyote as an object of worship, notwithstanding the criminal sanction against its unauthorized possession as a drug. The court did not hold that the state has no compelling interest in the regulation of drugs, but rather than the prohibition against possession of peyote as applied to this particular group did not appear on the record to indicate any serious danger to health or to enforcement of the narcotic laws against other citizens.

One of the most significant recent cases dealing with the compelling interest test is *State* v. *Yoder,* 49 Wis. 2d 430, 182 N.W. 2d 539.[4] In this case the Supreme Court of Wisconsin upheld the right of Amish parents to remove teenage children from the public schools and held unconstitutional, as applied to members of the Amish religion who have graduated from the eighth grade, notwithstanding the provisions of the compulsory education law. The court did not hold that there was no compelling interest in requiring education for children between seven and sixteen years, but rather no such interest in applying such requirements universally in the face of the free exercise claim. The court says, 49 Wis. 2d at 438, 182 N.W. 2d at 542: "A compelling interest is not just a general interest in the subject matter but the need to apply the regulation without exception to attain the purposes and objectives of the legislation." The court goes on to hold on the authority of *Sherbert* v. *Verner* and *In re Jenison* that an exemption for the Amish would not defeat the purpose of compulsory education.

The same specific rather than general concept of compelling state interest may be found in other cases.[5]

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[4] A petition for certiorari was granted by this court May 24, 1971, sub nom. *Wisconsin* v. *Yoder*, OT 1970, No. 1536.

[5] In *Shelton* v. *Tucker*, 364 U.S. 479, this court held that the state had an interest in the fitness and competency of its teachers, but not in compelling every teacher to disclose every organization with which he had been associated over a five-year period.

In *Schneider* v. *State*, 308 U.S. 147, 162, this court recognized the interest of the state in keeping its streets free of litter but held that such an interest did not justify an ordinance prohibiting a person rightly on the street from handing literature to one willing to receive it.

In *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 439, this court held, not that the State of Virginia had no compelling interest in regulating illegal practices of barratry, maintenance, and champerty, but that such interest was not compelling when weighed against the particular First Amendment activities shown by the record of that case.

It is to be noted that in each of these cases the free exercise claim was upheld on a finding that the cost to the state's regulatory system is slight.

The opinion of the Court of Appeals below by contrast defines the government interest, not in its specific application in this case, but in most general terms "in preserving the principle and broad purposes of the union shop". 440 F.2d at 18, (Appendix A, p. 22). The court also says, 440 F.2d at 18, (Appendix A, p. 23) "opposed to the plaintiff's [Petitioner's] interest are both the public and private interests in collective bargaining and industrial peace." In its footnote 3, 440 F.2d at 18, (Appendix A, p. 22) the court says, "We can take ready notice of the disruptive effects of union members being required to share their achievements, and their work with non-union workers."[6] The Court also states that sustaining the petitioner's position would be an "affront. . .to the congressionally supported principle of the union shop. . .", 440 F.2d at 18, (Appendix A, p. 23). Thus instead of dealing with the question of whether there is a compelling governmental interest in applying the union-shop requirement against a relatively small religious minority, the Court of Appeals defined compelling interest only in the broadest general terms of the government's interest in collective bargaining and in permitting the union shop in general. It is respectfully submitted that this view of compelling interest is clearly in conflict with

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Bates v. *Little Rock*, 361 U.S. 516, involved the basic and fundamental power of a municipality to tax. The Court found, however, no compelling interest in the specific application of that power to deter free association by compulsory disclosure of membership lists. See also *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 463-466.

[6] Needless to say, the alleged disruptive effect of requiring union workers to share their achievements with religious conscientious objectors is totally without support in the record of this case and therefore cannot be the basis for the denial of the First Amendment claim involved. See *Sherbert* v. *Verner*, 374 U.S. at 407.

Sherbert v. *Verner* and the principal cases following *Sherbert.*

Totally missing from the Court of Appeals opinion is consideration of the cost to the governmental regulatory scheme or to the welfare of the unions involved of granting the petitioner the exemption she claims. Under *Sherbert* v. *Verner,* 374 U.S. at 407, the burden is on the Government to demonstrate that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights." The petitioner in this case has proposed payment of the equivalent of union dues and fees to a non-union charity, which would result in a cost to her equal to that of employees who are members of the union, while at the same time excluding her from certain benefits of union membership. The petitioner has shown that the effect of granting exemption for religious conscientious objectors would be *de minimis,* inasmuch as the unions would lose only a tiny portion of the income they would otherwise receive, and as to the government policy involved, there would be only an insignificant increment to the approximately 25% of the labor force presently exempted from the union shop provisions of the National Labor Relations Act under § 14(b) of that Act. In this respect this case is distinguishable from *Gray* v. *Gulf, Mobile & Ohio Railroad Company,* supra, which was decided under the Railway Labor Act. The presence of § 14(b) also indicates a less compelling government interest under the National Labor Relations Act than under the Railway Labor Act. Cf. *International Assn. of Machinists* v. *Street,* 367 U.S. 740, 761.

The court's opinion below also conflicts with *Sherbert* v. *Verner* in its attempt to minimize the burden on petitioner's free exercise of religion in describing it as "not as severe as was *Sherbert's*", 440 F.2d at 18, (Appendix A, p. 23). There is no assurance, as the court below seems

to assume, that the petitioner will always be able to obtain suitable non-union employment. She has already lost substantial income by change of employment as well as all rights accrued under a company pension plan in a job she had held for eighteen years. The actual economic burden dealt with by this court in *Sherbert* v. *Verner* was a delay of only five weeks in the commencement of unemployment compensation benefits, as indicated in the opinion of the South Carolina Supreme Court, 240 S.C. 286, 289. It also appears that the total period of time for which Mrs. Sherbert might have received unemployment compensation did not exceed twenty-two weeks. See opinion of Mr. Justice Harlan, dissenting, 374 U.S. at 421.

It therefore appears that there is a conflict in principle between the opinion below and the decisions of this and other courts applying the compelling state interest test to First Amendment claims. Resolving this conflict and clarifying the test would be helpful to all courts in dealing with such constitutional claims.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

GERALD R. HEGARTY
Attorney for the Petitioner

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 7723

BEATRICE LINSCOTT,

PLAINTIFF, APPELLANT,

v.

MILLERS FALLS COMPANY et al.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Gerald R. Hegarty, with whom *Leonard M. Fisher*, and *Boardman Noland* were on brief, for appellant.

Cornelius J. Moynihan, Jr., with whom *Richard L. Morningstar*, and *Peabody, Brown, Rowley & Storey* were on brief, for Millers Falls Company, appellee.

Allen R. Rosenberg, with whom *Putnam, Bell & Russell* was on brief, for United Electrical, Radio & Machine Workers of America (UE), and UE Local 274, appellees.

March 29, 1971.

ALDRICH, *Chief Judge*. Plaintiff, Linscott, a Seventh-day Adventist, was employed by defendant Millers Falls Company, hereinafter company, from 1950 until October 1968. In 1968 defendant United Electrical, Radio & Machine Workers of America (UE), and its Local 274, hereinafter union, having been certified two years previously by the NLRB, entered into a collective bargaining agreement with the company which contained a provision requiring

a union shop. Plaintiff refused to pay initiation fees or dues because her religion forbad contributing financial or other support to a union. There is no question as to the sincerity of her conviction, or of its being a recognized religious belief.[1]

Admittedly, under the collective bargaining agreement, plaintiff's sole obligation to the union was the payment of dues and fees. She had offered to pay the equivalent to a non-religious charity, but the union declined the proposal. The company then discharged her. The present suit is for damages as well as injunctive and declaratory relief, based essentially upon the claim that plaintiff's discharge deprived her of the right to free exercise of religion under the First Amendment. The district court granted the defendants' motions to dismiss, 316 F. Supp. 1369, and plaintiff appeals.

Defendants first contend that plaintiff was discharged as the result of a private arrangement, and that the governmental activity necessary to bring the First Amendment in play was not present. Judge COFFIN would subscribe to this.[2] The majority of the court, however, while acknowledging that the present case may go a little further, finds insufficient basis for distinguishing *Railway Employes' Dep't* v. *Hanson*, 1956, 351 U.S. 225. There

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[1] *See Gray* v. *Gulf, Mobile & Ohio R.R.*, 5 Cir., 1970, 429 F.2d 1064, 1066 n.4, *cert. denied* U.S. , (1/11/71).

[2] In his concurring opinion Judge COFFIN seems to us to neglect the fact that Congress was something more than silent, and that the LMRA's recognition of the union shop, to the extent not limited by virtue of the permission granted by section 14(b), constitutes governmental endorsement in an area in which Congress makes the rules. When that endorsement is not curtailed in a particular state, it seems no less what he terms "but for" support than is the union shop provision in the Railway Labor Act. Secondly, Judge COFFIN's claim that we are going beyond *Shelley* v. *Kraemer* in finding "government action" before there is court enforcement of a private agreement overlooks the fact that *Hanson* has crossed that bridge. Sufficient potential is furnished by government approval even though it may ultimately be dissipated by a court's refusal to act.

the Railway Labor Act, as amended, 45 U.S.C. § 152, Eleventh, authorized union shop provisions in collective bargaining agreements. The state constitution contained a so-called "right to work" provision, which prohibited such agreements. Employees of a railroad, who did not wish to join the union, brought suit to enjoin enforcement of the union shop provision of its collective bargaining agreement. In holding that the Railway Labor Act controlled, the Court first considered whether Congress, having merely permitted union shop agreements when entered into by private parties, had given such agreements "the imprimatur of the federal law" so as to prevail over the state statute. The Court concluded that it had. It then turned to the question whether Congress could do this despite the resulting burden put on a dissenting employee's constitutional rights, deciding in favor of the union shop, see post.

Defendants would distinguish *Hanson* because, unlike the Railway Labor Act, section 14(b) of the LMRA, 29 U.S.C. § 164(b), allows the state to outlaw union shop agreements. This misapprehends what *Hanson* basically decided. If federal support attaches to the union shop if and when two parties agree to it, it is the same support, once it attaches, even though the consent of a third party, the state, is a pre-condition. The means by which the agreement is attained does not affect the significant language in *Hanson,* 351 U.S. at 232,

> "[T]he federal statute is the source of the power and authority by which any private rights are lost or sacrificed."

and note 4 appended thereto,

> "4. Once courts enforce the agreement the sanction of government is, of course, put behind them. See *Shelley* v. *Kraemer,* 334 U.S. 1; *Hurd* v. *Hodge,* 334 U.S. 24; *Barrows* v. *Jackson,* 346 U.S. 249."

What the cited cases mean, in terms of the present case, is that if the company declined to discharge the plaintiff, the union could institute a federally supported suit, if not an unfair labor practice charge, for failure to live up to its bargaining agreement. We can attach no weight in this context to the circumstance that section 152 of the Railway Labor Act affirmatively authorizes the union shop, while section 14(b) of the LMRA is cast in terms of empowering the state to outlaw it, by a so-called "right to work" law, a difference noted, without comment, in n. 5 of the *Hanson* opinion. 351 U.S. at 232. By section 14(b)'s necessary implication, federal approval, and hence federal enforcement, will exist in those states that do not enact such a law. See also section 8(a)(3), § 158(a)(3). We know of no principle that measures governmental action by the frequency or infrequency of its exercise. In the case at bar the union's demand that the plaintiff be discharged is as federally supported as was the similar demand in *Hanson*.

The more difficult question is that posed by the First Amendment: whether the governmental interest expressed in the labor legislation can justify this interference with plaintiff's competing interest in choosing the employment she wishes without cost to her religious convictions. Freedom of exercise of religion is not absolute. Plaintiff concedes, as she must, that there must be a "balancing" and that the governmental interest may be paramount if it is "compelling." *Sherbert* v. *Verner*, 1963, 374 U.S. 398, 403. The elements of such a balancing test include, in addition to the importance of the governmental and religious interests, the degree of interference with the religious practice. *See* Clark, Guidelines for the Free Exercise Clause, 83 Harv.L.Rev. 327 (1969); Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, 80 Harv.L. Rev. 1381, 1390 (1967). We turn, therefore, to an appraisal.

A strong governmental interest in the union shop was

found in *Hanson.* Some employees claimed that being obliged to join the union deprived them of freedom of association as guaranteed by the First Amendment, and that compelling the payment of dues violated Fifth Amendment due process. As against these contentions the Court held that "[i]ndustrial peace along the arteries of commerce [as] a legitimate objective," 351 U.S. at 233, justified the legislation. Undoubtedly the Court recognized the validity and importance of the congressional purpose to achieve uniform union membership, both to further peaceful labor relations and, as desirable for its own sake, to require a fair sharing of the costs of collective bargaining.

Sherbert v. *Verner,* to which we will return later, in fact adopted its "compelling state interest" test from freedom of association cases, *see Sherbert* v. *Verner,* 374 U.S. at 403, citing *NAACP* v. *Button,* 1963, 371 U.S. 415, 438, so that *Hanson's* balancing, and thus its conclusion, should be the same in the case before us, since the government's interest, and the plaintiff's burden (loss of a union-shop employer) are apparently the same. However, plaintiff points out that *Hanson* explicitly reserved some First Amendment questions:

> "[I]f the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case." 351 U.S. at 238.

It is not altogether clear what the Court meant to include by this language. To the extent that it was speaking of dues that were sought to be applied to non-union objectives, *cf. International Ass'n of Machinists* v. *Street,* 1961, 367 U.S. 740, there is no such suggestion in the case at bar. Nor is the union one that is devoted to forcing its members into ideological molds via membership restrictions, *e.g.,* barring Communists, a problem of which *Hanson* took note.

However, on the assumption that *Hanson,* faced only

with the more general freedom of association issue, is to be read as reserving our present question, we proceed with a balancing of the interests. In plaintiff's case of *Sherbert* v. *Verner,* a Seventh-day Adventist was discharged because she refused, on religious grounds, to work on Saturdays. She found herself unable to secure other employment not requiring Saturday work, and applied for unemployment compensation. The state refused, asserting that she was not involuntarily out of work. Mr. Justice Brennan, speaking for the Court, held the state interest insufficient to justify the interference with plaintiff's exercise of her religion.

The state interest in *Sherbert,* in compensating or not compensating single individuals, seems less substantial than the federal interest in *Hanson* in preserving the principle and broad purposes of the union shop. Here it is plaintiff's turn to seek to distinguish *Hanson* on the ground that the LMRA, unlike the Railway Labor Act, permits a state to outlaw the union shop by a "right to work" law. This circumstance, plaintiff says, demonstrates that there is no "compelling state [sic] interest" here to conflict with her religious interest. In our opinion the fact that Congress chose to share the decision, and to give the final say to the state, does not deny a federal interest in the case at bar, any more than leaving the final word to the parties themselves denied it in *Hanson.* The federal interest attaches if, and when, such action is believed locally to be appropriate as well as in furtherance of the policies behind the LMRA recited in 29 U.S.C. § 151.[3] With respect to *Sher-*

[3] It is for these reasons, among others, that we cannot accept plaintiff's argument that because in the total labor force there are so relatively few who share her views the matter is de minimis. We can take ready notice of the disruptive effects of union members being required to share their achievements, and their work, with non-union workers. The impact is substantially different from the minor accommodation that would be required in *Dewey* v. *Reynolds Metals Co.*, 6 Cir., 1970, 429 F.2d 324, *cert. granted* 1/18/71.

bert, while the government always has an interest in saving money, its primary concern in connection with unemployment compensation is protection of the disadvantaged person. To deny him physical sustenance because he will not affront his religious convictions would scarcely be considered social legislation. *Cf. Barnett* v. *Rodgers,* D.C.Cir., 1969, 410 F.2d 995. In the present case the interests are not merely that of the plaintiff versus the cost to the fisc; opposed to plaintiff's interest are both the public and private interests in collective bargaining and industrial peace.

Furthermore, plaintiff's burden is not as severe as was Sherbert's. Her alternative is not absolute destitution. The cost to her is being forced to take employment in a non-union shop — here, less remunerative employment. We conclude that in weighing the burden which falls upon the plaintiff if she would avoid offending her religious convictions, as against the affront which sustaining her position would offer to the congressionally supported principle of the union shop, it is plaintiff who must suffer. We agree with the Fifth Circuit. *Gray* v. *Gulf, Mobile & Ohio RR.,* n. 1, ante; *cf. Cap Santa Vue, Inc.* v. *NLRB,* D.C.Cir., 1970, 424 F.2d 883.[4]

Affirmed.

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[4] This decision makes it unnecessary to meet the contention advanced by defendants that plaintiff is precluded from maintaining this action. Defendants' assertion that the administrative prerequisites of a suit based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, must be exhausted whenever the suit could have been brought under Title VII, is supported by almost none of the cases cited. It at least seems certain that other, though equivalent, remedies were meant to survive the passage of this equal employment legislation. *See, e.g., Waters* v. *Wisconsin Steel Works of Int'l Harvester Co.,* 7 Cir., 1970, 427 F.2d 476, *cert. denied* 400 U.S. 911 (discriminatory employment action based on 42 U.S.C. § 1981 still exists); *United Packinghouse, Food & Allied Workers Int'l Union* v. *NLRB,* D.C.Cir., 1969, 416 F.2d 1126, 1133 n. 11, *cert. denied* 396 U.S. 903 (concurrent NLRB jurisdiction in this area remains). We doubt that we could, without specific indication from Congress, demand prior resort to the administrative part of the Title VII action before such independent actions may be brought.

COFFIN, *Circuit Judge,* concurring. I would affirm solely on the ground that plaintiff's complaint does not describe a violation of her constitutional rights as the result of any federal action. In my view the union shop provision at issue in *Railway Employes' Dept.* v. *Hanson,* 351 U.S. 225 (1956), was significantly different, insofar as its "federal action" implications are concerned, from the union shop provision in § 14(b) of the Labor Management Relations Act, 29 U.S.C. § 164(b).

In *Hanson* the Court began its discussion of federal involvement by agreeing with the Supreme Court of Nebraska that since the union shop provision of the Railway Labor Act had been enacted to strike down inconsistent laws in 17 states, " 'Such action on the part of Congress is a necessary part of every union shop contract entered into on the railroads as far as these 17 States are concerned for without it such contracts could not be enforced therein.' " 351 U.S. at 232. It is with reference to this statement that the Court adds its own phrasing: "We agree with that view. If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded." *Id.* Subsequently the Court contrasts, without comment, the express allowance of union shop in the Railway Labor Act with § 14(b) of Taft-Hartley which "makes the union shop agreement give way before a state law prohibiting it." *Id.,* n. 5. In sum, I read the Court as saying that the action of Congress was the essential, "but for" validating support for the union shop agreements.[1]

[1] The four cases cited by the Supreme Court in *Hanson,* at 232, for the proposition that Congressional involvement was the "but for" cause of the union shop provisions all concerned situations in which the governmental involvement was much greater and different than it is here. In *Smith* v. *Allwright,* 321 U.S. 649 (1944), and *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451 (1952), there was either direct statutory authorization for or close governmental supervision of the activities challenged as unconstitutional. The government was

Section 14(b) is not only incapable by its terms of overriding any inconsistent state legislation but, unlike the Railway Labor Act provision, represents a weakening rather than a strengthening of federal policy toward union shop. Since it cannot be realistically claimed that the net effect of § 14(b) was to increase federal support of union shop, it would follow logically from a ruling that § 14(b) constitutes federal support and authority for union shop that the pre-1947 Congressional silence also constituted federal support and authority: From that logical point it is but a short step to the conclusion that all Congressional silence constitutes endorsement or, put another way, that all federal inaction is really federal action.

I would therefore say that the reasoning in the text of *Hanson* is not applicable to such a neutral and independently unsanctioning statute as § 14(b). But the court's opinion makes a further argument based on a footnote reference in *Hanson,* 351 U.S. at 232 n. 4, to the invocation of government sanction when courts enforce an agreement. Applied to this case, the argument is that if the employer refused to discharge plaintiff, it would face both an unfair labor practice charge and a federal lawsuit. To this I think there are two answers. The first is that the possibility of such suits and charges exists whenever any clause of a collective bargaining agreement is violated, whether Congress has legislated concerning the clause or not. It strikes me oddly to think of every term in a bargaining agreement as bearing the imprimatur of the federal government simply because of the fact that a federal agency is charged with supervision of the processes of reaching agreements, the

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so involved in the challenged activity that the private party was viewed as performing a governmental function. *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192 (1944), and *Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952), concerned statutory interpretation as opposed to the applicability of Constitutional limitations to private parties. In both opinions, the challenged activity was specifically authorized by Congress.

end results of which are for the parties to determine. Moreover, I see no necessity for such a concept. Should a party seek to enforce any agreement discriminating against the exercise of a person's constitutional rights, courts would, under *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), simply not enforce it.

But there is a second reason why the mere prospect of court or agency sanctions falls short of constituting federal action. The Court's words are "Once courts enforce the agreement the sanction of government is, of course, put behind them." 351 U.S. at 232 n. 4. By implication there is no sanction until the courts (or agencies) enforce the agreement. As long as the parties to the collective bargaining do not seek enforcement of the contract but are content to adhere to the clause which allegedly discriminates, there is no governmental action.[2]

A finding that there is no federal action here sufficient to support plaintiff's cause of action would not prevent employees who were discriminated against by union-management agreements from seeking relief. At least two alternative routes for challenging such discriminations are available. The employee can bring a proceeding before the National Labor Relations Board alleging a violation of the union's duty of fair representation, *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192 (1944), or he may seek relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5. With these remedies available, an open-ended interpretation of federal action seems unnecessary as well as strained.

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[2] The scope of *Shelley* has been arguably restricted. *E.g.*, *Evans* v. *Abney*, 396 U.S. 435, 445 (1970). Certainly, the doctrine of that case has not been extended to a point where governmental action is created by a third party's challenging the private agreement in a court. If that were true, the Court's emphasis in *Shelley*, 334 U.S. at 19, of the validity of private agreements to include a racially restrictive covenant in a deed, would be meaningless.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7723.

BEATRICE LINSCOTT,
PLAINTIFF, APPELLANT,
v.
MILLERS FALLS COMPANY ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT

Entered March 29, 1971

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BEATRICE LINSCOTT

v.

MILLERS FALLS COMPANY, UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA (UE), and UE LOCAL 274

Civil Action No. 70-467-W

Gerald R. Hegarty, Springfield, Mass., for plaintiff.

Cornelius J. Moynihan, Jr. (Peabody, Brown, Rowley & Storey), Boston, Mass., for defendant Millers Falls Company.

Allan R. Rosenberg, Boston, Mass., for defendants United Electrical, Radio & Machine Workers of America (UE), and UE Local 274.

OPINION

September 16, 1970

WYZANSKI, C.J.

Defendants have moved to dismiss the complaint, which makes the following allegations.

Plaintiff is a Seventh Day Adventist who as a matter of religious belief is conscientiously opposed to making any financial contribution to any labor organization. Before October 11, 1968 she was employed by defendant Millers Falls Co. February 18, 1966 the NLRB, pursuant to §9 of the NLR Act, 29 U.S.C. § 159, certified defendant United Electrical, Radio & Machine Workers of America, of which defendant Local 274 is an affiliate, as the collective bargaining agent of Millers Falls' production employees, in-

cluding plaintiff. Thereafter the defendant unions and the employer entered into a collective bargaining agreement which provided that "Employees of the Company shall, as a condition of continued employment, be members of the Union in good standing during the term of this Agreement. Good standing shall mean only the payment of initiation fees, if any, and periodic dues regularly required of members of the Union under its by-laws and constitution." Plaintiff informed defendants of her religious objection to making any financial contribution to any labor organization. October 11, 1968 her employer discharged plaintiff because of her refusal to pay dues or fees to the defendant unions.

Plaintiff alleges that her "rights of free exercise of religion, due process of law, and other rights guaranteed by the First, Fifth and Ninth Amendments of the United States Constitution, are violated" by the application of §§7 and 8(a)(3) of the NLR Act, 29 U.S.C. §§157 and 158(a)(3), the NLRB's certification, and the quoted part of the collective bargaining contract. She seeks an injunction directing her employer to reinstate her, a declaratory judgment that her employer may not discharge her for failure to pay union dues, a declaratory judgment that as applied §§7 and 8(a)(3) of the NLR Act are unconstitutional, and damages.

Claiming damages in excess of $10,000, plaintiff alleges that this court has jurisdiction under 28 U.S.C. §1331(a).

Defendants move to dismiss because the complaint fails to state a cause of action. They rely on *Gray* v. *Gulf, Mobile & Ohio R.R. Co.*, 74 LRRM 2769, July 13, 1970, (5th Cir.), *Wicks* v. *So. Pac. Co.*, 231 F.2d 130, (9th Cir.), and *Otten* v. *B. & O. R. Co.*, 205 F.2d 58, (2nd Cir.).

The motions to dismiss must be granted.

It is true, as plaintiff argues, that unions which have been certified under §9 of the NLR Act as collective bargaining agents must exercise their statutory power, as

federal instrumentalities, subject to the First and Fifth Amendments and other relevant parts of the United States Constitution. *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 238; see Douglas J. dissenting *Black* v. *Cutter Laboratories*, 351 U.S. 292, 302 note. But that leaves for resolution the issue whether the particular exercise of the unions' statutory power here involved violates the plaintiff's rights under the First, Fifth or Ninth Amendments.

This is not a case in which the federally-empowered bargaining agent has entered into a contract which explicitly requires an employer to dismiss an employee who does or does not belong to a particular church. Cf. *International Association of Machinists* v. *Street*, 367 U.S. 740, 765. See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 898, 900. On the contrary, the contract at bar makes no reference to religion. Nor is there a covert intention to aid or hinder a religious belief. The contract merely requires an employer to dismiss an employee if he does not pay union fees and dues. The only purpose of the requirement is to supply funds to the union to compensate it for the performance of its functions as a federally-empowered agent, as contemplated by the NLR Act. The contract in effect imposes upon all of Millers Falls' production workers alike a uniform tax or forced contribution to pay for a service that, in the judgment of Congress, as expressed in section 1 of the NLR Act, 29 U.S.C. §151, will promote the uninterrupted flow of interstate commerce. Cf. *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 232; *International Association of Machinists* v. *Street*, 367 U.S. 740, 768.

Sherbert v. *Verner*, 374 U.S. 398, is the most recent Supreme Court authority relevant to the issue whether in requiring the employer to discharge plaintiff for noncompliance with the union dues clause of the contract deefndant unions used their federal statutory power in violation of the First Amendment. There the Supreme

Court held that it was a violation of Sherbert's First Amendment rights for a state commission applying a state unemployment compensation act to deny her unemployment compensation benefits, to which she would otherwise have been entitled, on the ground that she would not accept Saturday work contrary to her religious belief. Mr. Justice Brennan's opinion considered, first, the question whether the disqualification for benefits imposed any burden on the free exercise of Sherbert's religion (pp. 403-406), and, second, the question whether some compelling governmental interest enforced in the eligibility provisions of the statute justified the substantial infringement of Sherbert's First Amendment right, (pp. 406-409). Answering the first question affirmatively and the second question negatively, the opinion concluded that Sherbert was entitled to the claimed benefits.

In effect, the Sherbert case treats every officially authorized interference with religious freedom as a *prima facie* infringement of the free exercise of religion and hence as a presumptive violation of the First Amendment, but permits the alleged infringer to justify the supposed infringement by some compelling governmental interest. Mr. Justice Brennan cites, at p. 403, as examples of such justification the substantial threats to public safety, peace or order, involved in *Reynolds* v. *United States*, 98 U.S. 145, *Jacobson* v. *Massachusetts*, 197 U.S. 11, *Prince* v. *Massachusetts*, 321 U.S. 158, and *Cleveland* v. *United States*, 329 U.S. 14. No doubt, he also could have cited non-discriminatory taxes levied under a constitutional power to promote a constitutionally sanctioned purpose. No one supposes that such a tax can be lawfully avoided by one who on religious grounds is opposed to the government in general, or to the particular tax (if the power to lay and collect it was conferred by the Constitution and laws), or to the purpose

for which the proceeds of the tax are used (if the purpose be authorized by the Constitution). With respect to non-discriminatory taxes levied pursuant to a constitutional power, for a constitutional end, the law requires adherence to the ancient doctrine "Render, therefore, unto Caesar the things which are Caesar's; and unto God the things that are God's." Matt. 22:21.

We assume, consistently with the analysis in *Sherbert* v. *Verner*, that the choice presented to the present plaintiff either to pay the exacted union dues or to leave her employment was *prima facie* an infringement of, and a burden on, her right to the free exercise of religion. Nonetheless, there was a compelling governmental interest which justified that infringement and burden. Congress was concerned with the effect of labor disputes in disturbing the orderly flow of commerce. It sought to establish a new order of labor relations. An important aspect of that new order was the right of a union, chosen by a majority of employees in an appropriate unit as the representative of all in the unit, and the employer of those employees to agree that every employee in the unit should contribute to the costs incurred by the representative. See the opinions in the *Hanson* and *Street* cases already cited. Congress recognized that in some situations it would be a source of continual and serious interruptions of interstate commerce if there were free-riders. It was aware that to permit even a most sincere religious objector to escape the financial obligations of a union shop agreement might be an interference with the freedom of association, or rather of non-association, of those dues-paying employees who did not want the burden of carrying the costs of free-riders. See L. Hand C.J. in *Otten* v. *B. & O. R. Co.*, 205 F.2d 58, 61 (2nd Cir.), and Goldberg, C.J. in the last two paragraphs of *Gray* v. *Gulf, Mobile & Ohio R.R. Co.*, (5th Cir.), *supra*.

In short, free-riders in situations where the majority of employees and the employer wanted a union shop was in the judgment of Congress a substantial threat to the peace and order of interstate commerce. Congress, therefore, left it open, so far as federal law was concerned, for the employer and the federally-empowered representative of the employees to make a collective bargain requiring union membership.

If this action by the federally-empowered union does burden or interfere with plaintiff's exercise of religion it is nonetheless, as stated at p. 403 of *Sherbert*, not a violation of the First Amendment because "The conduct or actions so regulated . . . posed some substantial threat to public safety, peace or order. See, e.g., *Reynolds* v. *United States*, 98 U.S. 145; *Jacobson* v. *Massachusetts*, 197 U.S. 11; *Prince* v. *Massachusetts*, 321 U.S. 158; *Cleveland* v. *United States*, 329 U.S. 14."

Moreover, this action is not a violation of the First Amendment because it is the equivalent of the exaction of a non-discriminatory tax levied pursuant to a power conferred by the Constitution and laws and used for a purpose authorized by the Constitution.

There is little merit to plaintiff's argument that inasmuch as, under §14(b) of the NLR Act, 29 U.S.C. §164(b), a federally-empowered collective bargaining agent and an employer cannot make the payment of dues a condition of membership in states which have so-called right-to-work laws, it cannot be so important that a federally-empowered collective bargaining agent and an employer should be permitted to make the payment of dues a condition of membership applicable to a religious objector. One answer leaps to mind. Congress chose to give a state the power to preclude union shop contracts within its borders, but Congress has not chosen to give religious objectors a power

to preclude the application to them of union shop contracts. An even better answer may be that Congress considered that deference to local sentiment was the best way to achieve a satisfactory flow of interstate commerce, whereas a deference to minority religious groups might promote rather than allay disturbances of commerce.

Inasmuch as the unions in entering into the union shop contract did not violate plaintiff's constitutional rights, *a fortiori* the employer did not violate those rights by entering into and performing the contract. Unlike the unions, an employer is not a governmental instrumentality and has not been given special governmental power. An employer does not receive from the NLR Act a power to enter into a union shop contract. §8(a)(3) of the Act merely lifts any federal statutory ban which otherwise would outlaw such a contract. Cf. *Otten* v. *B. & O. R. Co.*, 205 F.2d 58, 60 (2nd Cir.). A purely private employer has a common law freedom to dismiss at will an employee who has no contrary contract. See *Adair* v. *United States*, 208 U.S. 161, 172-173; Douglas J. dissenting, *Black* v. *Cutter Laboratories*, 351 U.S. 292, 302. While that freedom has been curbed by statutes such as the NLR Act and the Civil Rights Act of July 2, 1964, 78 Stat. 255, 42 U.S.C. §2000 e-1 et seq., no federal statute and no Massachusetts statute precludes defendants Millers Falls from acting pursuant to a union shop contract (which has no avowed or covert purpose to discriminate on a religious, racial, or like prohibited ground) to dismiss an employee for non-payment of union dues. Nor does the First Amendment apply to a wholly private employer's act to terminate, pursuant to the common law, employment of one of his workers. See *Otten* v. *B. & O. R. Co.*, 205 F.2d 58, 61 (2nd Cir.).

The contention that as here applied §7 or §8(a)(3) of the NLR Act, or the NLRB certification, or the collective

bargaining contract, is in violation of the First Amendment fails for the same reasons that the contention that the conduct of the unions in the case at bar was in violation of the First Amendment failed.

For the same reasons, there is no merit to plaintiff's contentions based on the Fifth and Ninth Amendments.

Complaint dismissed with prejudice and with costs.

(s) CHARLES E. WYZANSKI, JR., *Chief Judge*

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BEATRICE LINSCOTT
v.
MILLERS FALLS COMPANY,
UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA (UE),
and UE LOCAL 274

Civil Action
No. 70-467-W

JUDGMENT
September 16, 1970

WYZANSKI, C.J.

In accordance with the opinion of this court dated September 16, 1970, defendants' motion to dismiss is granted and the complaint is dismissed with costs.

(s) WYZANSKI, *Chief Judge*

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In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 1864

BEATRICE LINSCOTT,
PETITIONER

v.

MILLERS FALLS COMPANY,
UNITED ELECTRICAL, RADIO & MACHINE
WORKERS OF AMERICA (UE), and
UE LOCAL 274,
RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Question Presented

Whether the non-discriminatory application of a valid union shop clause, made in accordance with §§7 and 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 157 and

158(a)(3), in a collective bargaining agreement between the Respondent Company and Respondent Unions, under which Petitioner was discharged from employment for failure to pay union dues to the Respondent Unions, violated Petitioner's rights under the First, Fifth and Ninth Amendments to the Constitution of the United States, where Petitioner refused to pay such dues because of her religious beliefs.

Argument

I. This Case Raises No New or Important Question of Constitutional Law.

Substantially the same question has been raised in the Courts of Appeals for the Second, Ninth and Fifth Circuits, in cases arising under the union shop provisions of the Railway Labor Act. In each case this Court has denied certiorari. See *Otten* v. *Baltimore and O. R. Co.*, 205 F2d 58, final judgment affirmed *sub nom. Otten* v. *Staten Island Rapid Transit Railway Co.*, 229 F2d 919 (CA 2) *cert. den.*, 351 U.S. 983; *Wicks* v. *So. Pac. Co.*, 231 F2d 139 (CA 9) *cert. den.*, 351 U.S. 946; *Gray* v. *Gulf Mobile & Ohio R. Co.*, 429 F2d 1064 (CA 5) *cert. den.* 400 U.S. 1001.

This Court also denied certiorari in *Russell* v. *Catherwood*, 399 U.S. 936, involving the related issue as to whether, under the New York Unemployment Insurance Law, an applicant for unemployment benefits must stand ready to accept suitable employment, when tendered, even though acceptance of the employment would compel him to join a union as to which he has "conscientious scruples".

In *Railway Employers' Department* v. *Hanson*, 351 U.S. 225 this Court sustained the constitutionality of the union shop provisions of the Railway Labor Act (45 U.S.C. §152 Eleventh) against an attack that it violated the First and

Fifth Amendments by forcing men into ideological and political associations which violate their freedom of conscience, freedom of association and freedom of thought protected by the Bill of Rights. In *NLRB* v. *General Motors Corporation,* 373 U.S. 734, this Court upheld as valid the agency shop clause of a collective bargaining agreement, similar to the union shop clause of the collective bargaining agreement in this case (Pet. p. 6), under the provision of the National Labor Relations Act [29 U.S.C. 158(a)(3)]. The Court below found that there is no suggestion in the case at bar that the dues of the Respondent Unions were sought to be applied to non-union objectives or that the Union was one that is devoted to forcing its members into ideological molds via membership restrictions (Pet. p. 21). On the present record, therefore, there is no more infringement of constitutional rights than this Court found in *Hanson.*

The result reached by the majority in the Court below in construing the union shop provisions [29 U.S.C. §§158 (a)(3), 164(b)] of the National Labor Relations Act is in accord with the decisions in the *Otten, Wicks* and *Gray* cases, *supra,* construing the union shop provisions of the Railway Labor Act. The majority held that federal action was embodied in the application of the union shop provisions of the National Labor Relations Act to Petitioner here but that the federal interest or congressionally supported principle of the union shop, on balance, outweighed the injury to Petitioner (Pet. pp. 18-20, 22-23). Under the concurring opinion of Judge Coffin and the similar interpretation by the Court of Appeals for the Tenth Circuit in *Reid* v. *McDonnell Douglas Corporation* (No. 417-70, June 8, 1970, 77 LRRM 2609, 40 U.S. Law Week 2003) of the union shop provisions of the National Labor Relations Act, no federal action is involved and the plaintiff's complaint

does not describe a violation of her constitutional rights as the result of any federal action (Pet. p. 24). On either basis, there is no support for Petitioner's claim that this case raises an important question of constitutional law not previously decided by this Court.

II. THERE IS NO CONFLICT, IN PRINCIPLE, OR IN DECISIONS, BETWEEN THE DECISION OF THE COURT OF APPEALS IN THIS CASE AND OF THIS COURT IN *Sherbert* v. *Verner*, 374 U.S. 398, OR OF OTHER COURTS.

There is no conflict between the decision of the Court below and the decisions of every other Court of Appeals which has considered the question here presented. Indeed, insofar as the union shop provisions of the National Labor Relations Act are more neutral and permissive than those of the Railway Labor Act and do not involve governmental action necessary to bring the First Amendment in play (Pet. p. 24, *Reid* v. *McDonnell Douglas Corp., supra*), the decision of the Court below has additional and alternative support for its result.

Petitioner asserts, however, that in a variety of other cases, not involving the union shop provisions of the Railway Labor Act, National Labor Relations Act, or any other similar act, there is a conflict in principle with the decision of the Court below in this case. Petitioner's prime reliance is on *Sherbert* v. *Verner*, 374 U.S. 398, which upheld the right of a Seventh Day Adventist to receive unemployment benefits from the State of South Carolina notwithstanding her unavailability for Saturday work based on her religious beliefs. Petitioner seeks to attack the application by the Court below of the balancing or "compelling state interest" test of *NAACP* v. *Button*, 371 U.S. 415, 438, on the ground that it applied that test in general rather than specific

terms, contrary to the way it was applied, Petitioner asserts, in *Sherbert* v. *Verner* and other cases.

The short answer to this contention is that the Court below properly balanced the competing interests involved, but that Petitioner is dissatisfied with the result. The Court below referred to the strong governmental interest in the union shop, as found in *Hanson, supra,* the objective of industrial peace along the arteries of commerce, and the validity and importance of the congressional purpose to achieve uniform union membership, both to further peaceful labor relations and to require a fair sharing of the cost of collective bargaining (Pet. pp. 20-21). It considered Petitioner's argument that the effect on granting the exemption sought for religious objectors would be *de minimis* (Pet. p. 15) and rejected that argument, in view of the disruptive effects of union members being required to share their achievements and their work with non-union workers.[1] It considered the burden on the Petitioner as not involving the denial of physical sustenance, as in *Sherbert* v. *Verner,* but in being forced to take employment in a non-union shop, in less remunerative employment (Pet. p. 23) as Petitioner in fact alleges in her complaint and argument (Pet. pp. 7, 16). Having thus made a specific application of the balancing

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[1] Petitioner seeks in her argument to justify her claim of exemption on the basis that she has proposed payment of the equivalent of union dues to a non-union charity, and is willing to be excluded from certain benefits of union membership (Pet. p. 15). This argument misstates the Complaint. The Complaint does not state that Petitioner is willing to be excluded from any union benefits. On the contrary, the Complaint alleges (Pet. p. 7) that she will abide by the regulations of the shop and the union with *regard to wages and working conditions* and in the event of strike she would side with neither the employer by remaining at work nor with the union by participating in strike activities and would refrain from any interference with union picketing. (Italics supplied). The Court below rightly noticed the disruptive effect of a non-union worker, paying no dues to the union and not participating in strike activities while obtaining the benefits of union wages and union working conditions (Pet. p. 22 ftn. 3).

test in this case, the Court below properly concluded that the compelling state interest in the congressionally supported principle of the union shop outweighed the injury to the Plaintiff.

Respectfully submitted,

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